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No. 85-140

IN THE

Supreme Court of the United States

October Term, 1985

Supreme Court, U.S.
FILED
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MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, MINNESOTA, MONTANA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Eleventh Circuit opinion in this case raises serious questions about the continued right of the States to legislate

[1]Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 36, letters of consent have been filed with the Clerk.

regarding the health, safety, and morals of their citizens. The Rutherford Institute is concerned about the implications for our social environment and tradition of family values.

Amici curiae are non-profit religious corporations with a national office in Manassas, Virginia and state chapters in Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas, and Virginia. The Rutherford Institute undertakes to participate in significant cases relating to First Amendment religious freedom and the preservation of the traditional moral values of this society. Counsel for *amici curiae* have specialized in constitutional litigation in state and federal courts and have participated as counsel for *amici curiae* before this Court. The Rutherford Institute believes that the expertise of its counsel will be of assistance in this case.

SUMMARY OF ARGUMENT

The principal issue before this Court is whether the Georgia sodomy statute violates the constitutional right of privacy recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Court has previously held that in order for decisions and activities to be included in the right of privacy, they must be " 'fundamental' or 'implicit in the concept of ordered liberty.' " *Roe v. Wade,* 410 U.S. 113, 152 (1973) (cit. omitted). In *Griswold, Roe v. Wade,* and numerous other decisions, this Court has followed the principle that no right can be considered fundamental unless it is rooted in the history and traditions of our society and is basic to our civil and political institutions.

The right of privacy has been carefully limited by this Court to decisions and activities relating to marriage, childbearing, and family. The right has been extended to these areas because they are basic to our civil and political institutions and, in our society, have historically and traditionally been considered beyond the proper scope of government regulations.

The practice of sodomy, even of a consensual and private nature, should not be cloaked with the constitutional right of privacy. The pursuit of such activity cannot be considered a fundamental right because it is not basic to our political and social institutions. A review of our history shows, moreover, that such practices have never been considered to be beyond the proper scope of government regulation. In fact, our institutions are built on a foundation not only different but totally inconsistent with such practices — monogamous marriage and the family unit. Moreover, our institutions would be eroded by the legitimization of sodomy. Therefore, this Court should refuse to extend the right of privacy to sodomy.

Should the Court recognize sodomy as protected by the right of privacy, all private consensual activities — including incest, polygamy, bestiality, etc. — would appear to be legalized. In addition, a rejection of the historical analysis previously employed by the Court to identify fundamental rights would eliminate all restraint in interpretation of the Fourteenth Amendment.

No equal protection issues are presented. If the Court addresses such issues, it should conclude that the Georgia statute is subject to review only under the rational basis test. The statute satisfies this text because it is rationally related to the State's legitimate interest in protecting and preserving morality.

ARGUMENT

I. INTRODUCTION

In this case, the Court is presented with "the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey v. Population Services International*, 431 U.S. 678, 688 n.5 (1977). The Eleventh Circuit has held that private consensual sodomy is protected

by the constitutional right of privacy. Based on this holding, the court concluded that the Georgia sodomy statute[2] can be upheld only if it is demonstrated that "the sodomy statute is a properly restrained method of safeguarding [the State's] interests." *Harwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985).

Amici curiae undertake to show that the right of privacy as developed in this Court's previous decisions provides no protection to the practice of sodomy. Because the Eleventh Circuit based its decision on the constitutional right of privacy, other constitutional issues — such as the equal protection claim — will not be discussed in detail. Although the general term "sodomy" will be used in this brief, it should be taken as referring to homosexual sodomy inasmuch as the constitutionality of the Georgia statute only as it applies to homosexual sodomy is before the Court. Both the district court and the Eleventh Circuit held that the married plaintiffs lacked standing. As a result only the claims of plaintiff Hardwick, an avowed homosexual who does not assert the rights of any heterosexual or married persons, are before the Court.

There have been a number of recent decisions on the consistency of sodomy statutes with the constitutional right of privacy. In *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd*, 425 U.S. 901 (1976), privacy, due process, and freedom of expression attacks on the Virginia sodomy statute were rejected. Two federal courts of appeals have recently reached results consistent with *Doe v. Commonwealth's Attorney*. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir.) (en banc), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985) (uphold-

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[2]The operative language of the Georgia statute provides: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Off. Code Ga. Ann. § 16-6-2.

ing Texas sodomy statute); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) (upholding military discharge of homosexual). In both cases, the courts refused to recognized private homosexual conduct as coming within the constitutional right of privacy. The courts also rejected equal protection challenges. A final decision in this area is *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981), in which the New York Court of Appeals struck down the sodomy statute of that state on privacy and equal protection grounds.

II. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has previously recognized that there are certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. In the words of Mr. Justice Cardozo, speaking for the Court, due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. State of Connecticut,* 302 U.S. 319, 325 (1937). *See Rochin v. People of California,* 342 U.S. 165, 169 (1952) (quoting *Snyder* and *Palko*). When such rights are restricted by state action, a necessary relationship between the action and a compelling state interest is required in order for the action to be upheld. *Griswold,* 381 U.S. at 497.

In its decisions dealing with the right of privacy, which is applied to the states through the Fourteenth Amendment, this Court has been careful to limit the scope of the right to matters which can truly be characterized as fundamental. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court said that "only

personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152 (cit. omitted). In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), the Court quoted this language from *Roe v. Wade* in holding that the right of privacy does not protect access by consenting adults to obscene materials outside the home. The Court said: "Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accomodation." *Id.* at 65-66. Under this analysis, it is not sufficient to find the right of privacy itself fundamental, but in addition all subsidiary rights protected under the right of privacy must themselves be fundamental.

In order for any right to be considered fundamental and, therefore eligible for protection under the privacy guarantee, it must be rooted in the history of our society and be basic to our civil and political institutions. Two older decisions which contribute to this principle are *Palko* and *Meyer v. Nebraska,* 262 U.S. 390 (1923). In *Palko,* the Court suggested that a search for rights protected through the Fourteenth Amendment should focus on " 'the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Palko,* 302 U.S. at 328. Moreover, in *Meyer* the Court suggested that "our institutions rest" upon certain fundamental rights which include the right of parents to control the education of their children. *Id.* at 400-02. More recently, in *Duncan v. Louisiana,* 391 U.S. 145 (1968), the Court addressed the question of fundamental rights in a criminal procedure context. In concluding that the right to jury trial is fundamental, the Court explored the historical role of such trials in the "Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Griswold,* the Court formally announced the right of

privacy. The Court held that a Connecticut statute which forbade the use of contraceptives violated the constitutional right of privacy of married persons. The Court located this right in certain "penumbras" of the First, Fourth, Fifth, and Ninth Amendments to the Constitution. 381 U.S. at 484. Since *Griswold*, the Court has made it clear that it regards the right of privacy as "founded in the Fourteenth Amendment's concept of personal liberty." *Roe v. Wade*, 410 U.S. at 153. In concluding that this right of privacy was violated by the Connecticut statute, the Court emphasized that the appellants had given information concerning contraception to married persons. *Griswold*, 381 U.S. at 480. The Court stated:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Id. at 486. In a concurring opinion, Justices Goldberg, Brennan, and Chief Justice Warren insisted that fundamental rights must be derived from the " 'traditions and [collective] conscience of our people.' " *Id.* at 493 (cit. omitted). They went on to reemphasize the basic position of "the rights to marital privacy and to marry and raise a family" in our society and that the marriage and family relationship are "as old and fundamental as our entire civilization." *Id.* at 495-496.

In *Roe v. Wade*, the Court again committed itself to historical analysis in determining what rights are fundamental and therefore protected by the right of privacy. After an extensive survey of the medical and legal history of abortion, the Court concluded that restrictive criminal abortion laws were "of relatively recent vintage." *Id.* at 129. In concluding that a woman's right to terminate her pregnancy should be encompassed in the right of privacy, the Court placed particular reliance upon its conclusion

that Anglo-American law had generally treated abortion with less severity than the state statutes then in force. The Court summarized: "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th Century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140. *See also id.* at 157-158, 165. An essential premise in the Court's reasoning was its conclusion regarding the legal and medical history of abortion. Justice Rehnquist's dissent was based at least in part on his view that the Court had misread this history. His conclusion was that "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Id. at 174 (Rehnquist J., dissenting) (cit. omitted).

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (plurality opinion), the Court again indicated its obedience to history in the development of the right of privacy. The Court was faced with a city housing ordinance which had the effect of forbidding a grandmother from living in the same home with her son and two grandsons. In a plurality opinion authored by Justice Powell, it was concluded that the ordinance violated the Due Process Clause of the Fourteenth Amendment. The decision was based on an analysis of the importance of the family, both extended and nuclear, in American society. The Court said: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503. The plurality opinion emphasized that its "approach [was] grounded in history," *id.* at 503 n.12, and that "arbitary lines" need not be drawn when there is "careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " *Id.* at 502-03, *quoting Griswold,* 381 U.S. at 501 (Harlan, J., concurring). *See also Roberts v. United States Jaycees,* 104

S. Ct. 3244, 3250 (1984) (discussing historical importance and constitutional protection of the "personal affiliations that attend the creation and sustenance of a family.")

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court again emphasized the importance of history in deciding whether a privacy-related activity should be protected as a fundamental right. Based on "[t]he history and culture of Western civilization [which] reflect[s] a strong tradition of parental concern for the nurture and upbringing of their children," the Court held that, under the First Amendment guarantee of freedom of religion, Amish parents could not be convicted of vilolating the Wisconsin compulsorary school attendance statutes for failing to cause their children to attend formal high school until the age of sixteen. *Id.* at 232.

Without the constraint and guidance of history in discerning the fundamental rights protected against the states, judges would be free to legislate their own preferences at the expense of those of the American people as expressed through their elected representatives. In *Griswold,* itself, the Court recognized: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482. In *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan, in an oft-quoted dissenting opinion which adumbrated the right of privacy, expressed concern that fundamental rights analysis under the Due Process Clause of the Fourteenth Amendment contained potential for judicial abuse. However, Justice Harlan concluded that such abuse would be prevented by respect for "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Id.* at 542, *quoted in Moore,* 431 U.S. at 501. Also, as pointed out above, the plurality in *Moore* repeatedly emphasized that "careful 'respect for the teachings of history' " is necessary in order for appropraite limits to be placed on substantive due process. 431 U.S. at 503.

III. THIS COURT HAS PREVIOUSLY LIMITED THE RIGHT OF PRIVACY TO ACTIVITIES AND DECISIONS RELATING TO MARRIAGE, CHILD BEARING, AND FAMILY BECAUSE THESE MATTERS HAVE HISTORICALLY AND TRADITIONALLY BEEN CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION.

In keeping with the historical analysis described above, the previous privacy decisions of the Court have carefully limited the scope of the right to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). In *Carey*, the Court listed these same areas along with supporting authorities. 431 U.S. at 684-85.

The list of protected decisions and activities given in these decisions can readily be simplified to three categories — marriage, child bearing, and family. Although *Griswold* was concerned with the use by married persons of contraceptives, 381 U.S. at 480, 485-6, the Court has since recognized the application of the right of privacy to activities and decisions of unmarried persons as they relate to child bearing or procreation. *Roe v. Wade*, 410 U.S. 113 (abortion) (plaintiff was an unmarried female); *Eisenstadt v. Baird, 405 U.S. 438*, 413 (1972) (decided under Equal Protection Clause) ("the decision to bear or beget a child"); *Carey*, 431 U.S. at 687 ("matters of child bearing"). It is enlightening that in *Carey* the Court summarized *Griswold*, as follows: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of child bearing from unjustified intrusion by the State." *Carey*, 431 U.S. at 687.

The areas of marriage, child bearing, and family which the Court has previously found to be encompassed by the constitutional right of privacy have historically and traditionally been free of government regulation. This " 'freedom of personal choice in matters of marriage and family life' " is beyond the reach of government regulation. *Akron v. Akron Center for Reproductive Health, Inc.*, 462

U.S. 416, 427 (1983), *quoting Roe v. Wade*, 410 U.S. at 169 (Stewart, J., concurring). The fundamental and basic role of marriage and family in our society has been recognized on many occasions by the Court. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), in which a Wisconsin statute which required certain persons to obtain a court order before they could marry was invalidated, the Court summarized its previous decisions in this area:

> [T]he right to marry is of fundamental importance for all individuals. Long ago in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home, and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, and in *Skinner v. Oklahoma ex rel. Williamson*, [] 316 U.S. 535 (1942), marriage was described as "fundamental to the very existence and survival of the race," 316 U.S. at 541.

Id. at 384. The Court went on to conclude that the right to marry is one of the "matters of family life" protected by the right of privacy implicit in the Due Process Clause of the Fourteenth Amendment. In *Moore*, the Court also dwelled on the historical role of marriage and the family in America society: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. at 503 (plurality opinion). *See also Wisconsin v. Yoder*, 406 U.S. at 232-33; *Roberts*, 104 S. Ct. at 3250.

An early decision regarding the fundamental status of the family not discussed in the above-cited cases is *Reynolds v.*

United States, 98 U.S. (8 Otto) 145 (1878). In *Reynolds*, the Court affirmed a criminal conviction of a Mormon for practicing polygamy and rejected an argument that Congress' prohibition of polygamy violated the defendant's right to freely exercise his religion. After surveying the history of laws against polygamy and the history and role of monogamous marriage in America society, the Court concluded, "[I]t is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166. A few years later, the Court again addressed polygamy in *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). The Court said that "[t]he state has a perfect right to prohibit polygamy" because it is contrary to "the civilization which Christianity has produced in the Western World." *Id.* 49-50. In a recent Tenth Circuit decision, *Potter v. Murray City*, 760 F.2d 1065, 1069 (10th Cir. 1985), *Reynolds* was followed in rejecting a constitutional challenge under the right of privacy to the Utah prohibition of polygamy. In reaching its decision, the Court observed: "Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built." *Id.* at 1070.

It can be seen, therefore, that the right of privacy protects monogamous marriage, child bearing, and the family from governmental regulation because they have historically and traditionally been basic to our society. As a result, they are protected through the right of privacy implicit in the Due Process clause of the Fourteenth Amendment.

These principles must now be applied to the issue before the Court. The issue presented here is whether the private consensual practice of sodomy has historically been free of government regulation and whether sodomy is so basic to our civil and political institutions as to be implicit in the concept of ordered liberty. In other words, does the practice of sodomy play the same or a similar role to that served by

monogamous marriage and family life, which are fundamental to our society, *see Zablocki*, 434 U.S. at 383-87, and which the right of privacy is designed to protect? As the following historical survey demonstrates, this question can only be answered in the negative.

IV. TRADITIONALLY AND HISTORICALLY WESTERN SOCIETY HAS CONSIDERED THE PRACTICE OF SODOMY, EVEN OF A CONSENSUAL AND PRIVATE NATURE, AS WITHIN THE PROPER SCOPE OF GOVERNMENT REGULATION.

Laws forbidding the practice of sodomy, of which the Georgia statute is an example, have a long history in Western society. American laws against such practices can be traced back to the Judeo-Christian Scriptures, Roman law, the teachings of the Christian Church, and early English common and statutory law.

The Jewish and Christian Scriptures unequivocably condemn homosexual sodomy. Prior to the Mosaic Law, the cities of Sodom and Gomorrah were condemned at least in part because of the prevalance of homosexual practices. Genesis 18:16-19:29. *See also* Jude 7. Under the Mosiac Law, it was a capital offense for a man to lay with a male as with a female. Leviticus 18:22; 20:13. In the New Testament, the Apostle Paul condemned homosexual activities in Romans 1:26-27;[3] I Corinthians 6:9-10; and I Timothy 1:8-10.

The Christian Church has followed the teachings of Scripture in condemning homosexual practices. All of the early church Fathers who spoke on the subject condemned the practice. These included Tertullian, John Chrysostom, Augustine, and Clement of Alexandria. *See* D. Bailey,

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[3]In this passage, Paul uses the phrase "against nature" which was later used in the common law of England and found its way into the statutes of many American states. This phrase was also used by Plato in a passage criticizing homosexual relations. Plato, *Laws*, 8. 841. d.

Homosexuality and the Western Christian Tradition, 82-85 (1955 & photo. reprint 1975). In addition, numerous Christian Councils and Penitentials have condemned the practice of homosexuality. *Id.* at 86-110. During the medieval period, many Christian scholars and church officials also condemned homosexual practices. *Id.* at 110-20. Most notable was St. Thomas Aquinas. *Summa Theologica*, II-II, Q. cliii, cliv., *cited in* Bailey, *supra,* at 115-19. Even today most Christian churches continue to regard the practice of homosexuality as sin.

Ancient Greek and Roman attitudes should also be mentioned. In ancient Greece, pederasty was commonly practiced and homosexual love sometimes idealized. See R. Flaceliere, *Love in Ancient Greece* (J. Cleugh trans. 1962). However, there is no evidence that homosexuality met with general social approval. *Id.* at 62-63. In fact, the poet Aristophanes ridiculed homosexuals in his comedies.

Roman law is particularly important because of its influence on English law. An early law was the *Lex Scantinia.* Bailey, *supra,* at 64-66. Eventually, the Christian emperors promulgated laws against sodomy. Of particular importance were Justinian's laws promulgated in 528 and 544. *See Bailey, supra,* at 70-81. As one authority says, "Justinian through his *Novellae* and codification of the law, played a considerable part in determining the Western Christian attitude towards homosexual practices. . . ." Bailey, *supra,* at 81.

English common and statutory law have historically condemned the practice of sodomy. Around the end of the 13th Century, two complications, *Britton* and *Fleta*, described sodomy as a capital offense. *See* 3 W. Russell, *A Treatise on Crimes and Misdemeanors* 698 (1865 ed.) (1st ed. 1819); Bailey, *supra,* at 145-46. In 1533, an important statute was enacted making sodomy a felony and transferring authority over such cases from the ecclesiastical courts to secular tribunals.[4] Other statutes were enacted in 1548,

[4]25 Hen. 8, c. 6.

1563, 1828, 1861, and 1886.[5] In the third part of his *Institutes,* Sir Edward Coke stated that sodomy was "against the ordinance of the Creator and order of nature." He also stated that the method of execution should be by hanging. 3 E. Coke, *Institutes* 58 (1644). Later, Sir William Blackstone discussed the elements of and method of execution for the "crime against nature" which he characterized as "of a still deeper malignity than rape" 4 W. Blackstone, *Commentaries* 215-16.

It is not surprising then that the American colonies and states, in addition to the recognition of sodomy as a common law crime, enacted their own prohibitions of sodomy. Many American jurisdictions have even used the common law description "crime against nature" or "buggery." *See* T. Calvani, *Homosexuality and the Law —An Overview,* 17 N.Y.L.F. 273, 280-87 (1971). Because in the case before the Court, the contention is made that the practice of sodomy should be protected through the Fourteenth Amendment, it is particularly significant to consider American statutes which were in force in 1868, when the Fourteenth Amendment was adopted. The existence of state statutes at and prior to that time indicates that the Fourteenth Amendment was not intended to remove the power of the states to prohibit sodomy. In 1868, it appears that at least 34 of the 37 states in the Union, in addition to several territories, had at some point enacted sodomy statutes. *See* Appendix A. Note that the enactment of such laws shortly after the adoption of the Amendment also supports such an inference. It is unnecessary, however, to include all statutes enacted or reenacted after 1868 because the fact, as discussed below, that all American states still had such statutes in force in 1961 shows that these statutes have continuously been on the books.

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[5] *See,* 2, 3 Edw. 6, c. 92, Eliz. 1, c. 17; 9 Geo. 4, c. 31; 24 & 25 Vict. c. 100 (removing death penalty); 48 & 49 Vict. c. 69. *See* Bailey, *supra,* at 147-52. In 1967, English laws against consensual sodomy were repealed.

The existence of sodomy laws at the time of the adoption of the Fourteenth Amendment is significant because this Court has used a similar historical analysis, in other contexts, in order to determine the meaning of a constitutional provision. For example, in *Roth v. United States*, 354 U.S. 476 (1957), the Court reviewed various state laws against libel, blasphemy, and profanity which were in force at the time of the adoption of the First Amendment. The Court concluded: "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 482. The Court then cited several late 18th century and early 19th century statutes and cases concerning obscenity. *Id.* at 483 n.13. The materials cited by the Court to support the proposition that obscenity was not intended to be protected speech within the meaning of the First Amendment are certainly less unanimous and less impressive than the above-cited historical materials regarding the regulation of sodomy. Many other examples of the use of the historical method to determine the meaning of the Constitution could be cited. *E.g., Payton v. New York*, 445 U.S. 573 (1980) (concerning the Fourth Amendment); *Reynolds*, 98 U.S. (8 Otto) at 165 (regarding the practice of polygamy, the Court concluded: "In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.")

The scope of statutes prohibiting "crimes against nature" has been a matter of some controversy. It is generally thought that the common law prohibition was limited to copulation *per anum*. *See* Calvani, *supra*, at 276; J. Rizzo, *The Constitutionality of Sodomy Statutes*, 45 Fordham L. Rev. 553, 556-57 (1976). Many American jurisdictions have, however, construed the common law language of their sodomy statutes to include copulation *per os*. *See* Calvani, *supra*, at 276-77, 280-87. Rizzo, *supra*, at 556-57.

This Court has in the past upheld convictions for copulation *per os* under sodomy statutes which employ the common law "crime against nature" formulation. *Rose v. Locke*, 423 U.S. 48 (1975); *Wainwright v. Stone*, 414 U.S. 21 (1973).[6]

It appears that until 1961 all American states had criminal statutes forbidding the practice of sodomy, even of a private and consensual nature. *See* R. Slovenko, *Sexual Behvaior and the Law* 83 (1965). However, a decriminalization movement began in 1961 when Illinois made a statutory change removing penalities from the consensual and private practice of homosexual relations. *See* Calvani, *supra*, at 278; Slovenko, *Sexual Behavior and the Law*, supra, at 83. The next state to decriminalize private consensual homosexual activity was Connecticut in 1971. *See* Calvani, *supra*, at 278.

The decriminalization movement has gained considerable monmentun since the change in Illinois law in 1961. At present, it appears that 25 states and the District of Columbia still have in force criminal statutes forbidding private consensual sodomy. *See* Appendix B. The statutes of the remaining states have been repealed or, in a few cases, struck down by state courts. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1285 (1985).

The conclusions to be drawn from this discussion of history are obvious. American and Western society in general have historically and traditionally forbidden through criminal law the practice of sodomy. From the very outset of our society, criminal law has regulated even private consensual sodomy. Prior to the recent decriminalization movement, there has never been a time when the practice of private consensual sodomy has been considered beyond the

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[6]In the same cases, the Court rejected vagueness attacks on the common law language "crime against nature."

proper scope of government regulation. As the privacy decisions of this Court establish, in our society various "zones of privacy" have historically and traditionally been considered fundamental and beyond government reach. *Roe v. Wade,* 410 U.S. at 152. However, the practice of sodomy, even in a private and consensual setting has never been considered as coming within such a "zone of privacy."

The conclusion that the history and traditions of this Nation do not support a right to the private consensual practice of sodomy was also reached by Judge Gabrielli of the New York Court of Appeals in his dissenting opinion in *Onofre.* He said:

> Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of rape [cits. omitted]. Indeed, as early as 1553, during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various states. Thus, although some may take offense at the persistence of the proscriptions against consensual sodomy in our modern law, the fact remains that *western man has never been free to pursue his own choice of sexual gratification without fear of State interference. Consequently, it simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clause of the Fifth and Fourteenth Amendments.*

415 N.E.2d at 949 (emphasis added). *See also Baker, v. Wade,* 769 F.2d at 292 (observing "the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries").

On a number of occasions, this Court has recognized that in our society homosexual conduct is considered to be

perverse and deviant.[7] This reinforces the conclusion that historically and traditionally the practice of sodomy has not been recognized to be within any protected zone of privacy. In *Boutilier v. Immigration & Naturalization Service,* 387 U.S. 118 (1967), the Court construed language of the Immigration and Nationality Act barring "[a]liens afflicted with psychopathic personality" to include "all homosexuals and other sex perverts." *Id.* at 122. Beginning in *Mishkin v. State of New York,* 383 U.S. 502 (1966), the Court has held in a number of obscenity decisions that homosexuals are "a clearly defined deviant sexual group" and that the prurient appeal of material distributed to them may be "satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." *Id.* at 508. *See also id.* at 509. In subsequent cases, the Court has not wavered from this position. *Pinkus v. United States,* 436 U.S. 293, 302 (1978), *rev'g on other grounds,* 551 F.2d 1155, 1158-59 (9th Cir. 1977); *Hamling v. United States,* 418 U.S. 87, 92-93, 127-30 (1974).

V. BECAUSE THE PRACTICE OF SODOMY, EVEN OF A CONSENSUAL AND PRIVATE NATURE, HAS NEVER HISTORICALLY OR TRADITIONALLY BEEN CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, IT CANNOT BE CONSIDERED A FUNDAMENTAL RIGHT APPROPRIATE FOR PROTECTION BY THE RIGHT OF PRIVACY.

Because there has been no historical or traditional zone

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[7]In 1974, the American Psychiatric Association (APA) eliminated the general category of homosexuality from its Diagnostic and Statistical Manual of Mental Disorders and replaced it with a category called "sexual orientation disturbance" which applies only to "ego-dystonic" homosexuality. The vote by APA members, which was hotly contested, was prompted by demonstrations and disruptions staged by homosexuals. The change in nomenclature has been severely criticized, even by members of the Association. R. Slovenko, *The Homosexual and Society, a Historical Perspective,* 10 U. Dayton L. Rev. 445, 449-51 (1985).

of privacy surrounding the practice of sodomy, it cannot be considered a fundamental right appropriate for application against the states through the Fourteenth Amendment. As demonstrated above, the requisite historical basis for a traditional right is lacking with respect to sodomy. The conclusion is irresistable, therefore, that the practice of private consensual sodomy cannot be regarded as a fundamental right protected through the Fourteenth Amendment.

In *Rose v. Locke*, 423 U.S. 48 (1975), this Court specifically held that the Tennessee sodomy statute did not implicate fundamental rights. In upholding a conviction under the statute against a constitutional attack, the Court said: "This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny [cit. omitted]." *Id.* at 50 n.3. This holding that sodomy statutes do not implicate fundamental rights is consistent with the Court's acknowledgment in *Roe v. Wade* that is has never recognized "an unlimited right to do with one's body as one pleases." 410 U.S. at 154.

The conclusion that sodomy statutes do not implicate fundamental rights is reinforced by comments of some of the members of this Court in previous decisions. In his well known dissent in *Poe v. Ullman*, which foreshadowed the development of the right of privacy, Justice Harlan specifically said that homosexual practices, even though "concealed in the home" were a proper matter of state concern and could be forbidden by the states. According to the Justice:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range or subjects

> with which every society in civilized time has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine must be built upon that basis.

367 U.S. at 545, 46. Note that Justice Harlan not only found that there is no fundamental right to the practice of homosexuality, but in fact concluded that there is a fundamental "pattern . . . deeply pressed into the substance of our social life" against such practices. Later in his dissenting opinion, the Justice repeated his position "that adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription. *Id.* at 552-53.

Other pertinent comments can be found in *Griswold, Zablocki,* and *Carey*. In *Griswold,* Justice Goldberg wrote an opinion in which chief Justice Warren and Justice Brennan joined. In this opinion, these Justices quoted a passage from Justice Harlan's dissenting opinion in *Poe v. Ullman,* that "[a]dultery, homosexuality and the like are sexual intimacies which the State forbids." *Griswold,* 381 U.S. at 499. This passage was quoted in support of the proposition that the Court's holding in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Id.* at 498-99. In his concurring opinion in *Zablocki,* Justice Powell suggested that "[s]tate regulations . . . includ[ing] bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests" should not be reviewed under a "'compelling state purpose'", test. 434 U.S. at 399. Finally, it should be mentioned that in *Carey, supra,* Justice Rehnquist stated in a dissenting opinion that he regarded

Doe v. Commonwealth's Attorney, which upheld the Virginia sodomy statute, as "definitively" establishing the validity of criminal statutes prohibiting certain consensual acts. *Carey,* 431 U.S. at 718 n.2.

Respondent cannot show that there is any fundamental right to the private consensual practice of sodomy. As has been demonstrated, the fundamental rights question cannot be resolved by perusing the latest public opinion poll. Rather, the question is whether this society recognizes a right to the practice of sodomy which is fundamental in a historical and traditional sense. After all, neither the Constitution nor the Fourteenth Amendment was written yesterday. The recent decriminalization movement, itself, shows that historically and traditionally no fundamental right has been recognized to the practice of sodomy. [8] *If historical and traditional attitudes had been tolerant of the practice, no decriminalization movement would be needed.*

Both of the major lower court decisions which hold that sodomy is imbued with a right of privacy failed to apply the historical analysis which this Court has used in its privacy decisions. In neither *Hardwick* nor *Onofre* did the courts address the issue of whether sodomy has traditionally and historically been considered a fundamental right.

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[8]The decriminalization movement also shows that the political branches of government are responsive to changes in public morality and consensus. When our political representatives are mandated by their respective electorates to change the law in this area, presumably they do so. That this has happened in some states certainly does not establish any fundamental right to the practice of sodomy. Rather, it simply shows that our representative government is working as designed.

VI. ANY DEPARTURE FROM THE HISTORICAL ANALYSIS EMPLOYED BY THIS COURT IN ITS PREVIOUS PRIVACY DECISIONS WOULD SERIOUSLY UNDERMINE THE INSTITUTIONS OF THIS NATION AND COULD LEAD TO THE INVALIDATION OF ALL REGULATIONS OF PRIVATE CONDUCT.

If this Court fails to reverse the Eleventh Circuit in this case and steer the development of the right of privacy back to the historical path previously set by the Court, the stability and identity of this society will be eroded because it has been built upon a foundation inconsistent with the legalized practice of homosexuality. In addition, the integrity of constitutional construction will suffer.

A number of enticing formulae have been proposed as substitutes for the historical analysis which this Court has previously prescribed for determining the scope of the right of privacy. The nearest at hand is that of the Eleventh Circuit in this very case. Although it is difficult to discern the explanatory principle of the court's decision, it appears that the Eleventh Circuit would protect all "individual decisions critical to personal autonomy" and their "public consequences" which have to do with sexual activity of a private and consensual nature. 760 F.2d at 1211. The court also noted that for some people "the sexual activity in question here serves the same purpose as the intimacy of marriage" which was protected in *Griswold. Hardwick, 760 F.2d* at 1212. Thus, it appears that the Eleventh Circuit would cloak with the right of privacy all private activities which, for those involved, "serve[] the same purpose as the intimacy of marriage." The Eleventh Circuit has moved from the original purpose of the privacy doctrine of protecting the intimacy of marriage and family to the protection of anything which might take the place of marriage for the individual involved.[9] This is a far cry from

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[9]The degree to which private consensual sodomy serves the purpose of marriage in this society is highly debatable. Of course, the fundamental

this Court's teaching in *Roe v. Wade,* that "only personal rights that can be deemed 'fundamental' or implicit in the concept of ordered liberty . . . are included in this guarantee of personal privacy." 410 U.S. at 152 (cit. omitted).

The New York Court of Appeals has also proposed a new rationale for the right of privacy. That court held in *Onofre* that the right of privacy guarantees "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint." 415 N.E.2d at 939. A search of the court's opinion for a governing principle which might be used to identify and limit the decisions and conduct which are to be protected yields only the conclusion that physical harm must be shown in order to justify regulation of such matters.[10]

(Footnote 9 continued)
feature of marriage is a bilateral dependency and fidelity. Extreme sexual promiscuity is a well-known featury of the "gay" sub-culture. See M. Hunt, *Gay: What You Should Know About Homosexuality* 157 (1977) ("The average gay man has one thousand different sex partners in a lifetime, most of whom are strangers and one-time partners. In contrast, the average straight man has from five to nine sex partners in a lifetime, most of them persons he cares about and has sex with repeatedly.")

[10]In *On Liberty* (1859), John Stuart Mill argued that "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others." *Id.* at 10-11(1975 ed.). The manner in which American courts have been influenced by Mill is astounding. For example, in *Commonwealth v. Bonadio,* 490 Pa. 91, 415 A.2d 47 (1980), the Pennsylvania Supreme Court quoted Mill in concluding that the Pennsylvania sodomy statute denied equal protection. 415 A.2d at 50-51. The Fourteenth Amendment of the Constitution may incorporate many things, but it does not incorporate the libertarian ideals of Mill. *See Paris Adult Theater I v. Slaton,* 413 U.S. 49, at 68 n.14 (1973) (expressly rejecting Mill's views with respect to "the proposition that conduct involving consenting adults only is always beyond state regulation").

A number of commentators also propose new approaches to the right of privacy. For example, Professor Richard B. Saphire suggests as the "seeds of a guiding principle" the following: "Those decisions that 'fundamentally affect the person' and necessarily implicate human 'emotions and sensations' in deep and profound ways are entitled to at least some measure of constitutional protection." Saphire, *Gay Rights and the Constitution*, 10 U. Dayton L. Rev. 767, 787-88 (1985). Another matrix for deciding what should be protected by the right of privacy is offered by Professor David A. Richards:

> We have proposed a theory of the *form* of considerations which must be assessed [sic] considering issues involving the constitutional right to privacy, namely, (1) whether, in the light of contemporary evidence, there is any good moral reason to believe that certain conduct, traditionally conceived as morally wrong, is wrong at all; (2) whether the conduct relates to basic life plan choices; and (3) consequent on (2), whether paternalistic considerations are radically inappropriate.

Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights in the Unwritten Constitution,* 30 Hastings L. J. 957, 1014 (1979) (emphasis in original). *See also* K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 625 (1980).

For the Court to follow of any of the suggestions mentioned above, including that of the Eleventh Circuit in this case, would constitute a total departure from the historical approach employed in the Court's previous privacy decisions and would amount to acceptance of the proposal declined in *Roe v. Wade,* that "one has an unlimited right to do with one's body as one pleases." 410 U.S. at 154. A rejection of the tether of history would also constitute a renunciation of any restrictions on judicial decisions in this area. Such a departure would represent an

unprincipled effort "to keep the Constitution in tune with the times," *Griswold, supra,* at 522 (Harlan, J., concurring), without regard to the amending process and the responsibilities of the political branches. It would also seriously undermine the integrity of constitutional construction.

If the restraints of the historical approach are rejected and the right of privacy is extended to protect all private, consensual, and seemingly non-harmful activities, the very foundations of this society will be shaken. As was discussed previously, this Court has on many occasions recognized the fundamental role of monogamous marriage and the family unit in American society. Not only does the unregulated practice of sodomy not lie at the base of all our institutions, but our institutions are built on a foundation which is incompatible with such practices—i.e., monogamous marriage and the family unit.

Any decision treating the practice of sodomy as constitutionally protected would inevitably carry additional baggage. There is already a building clamor from some quarters for the legalization of homosexual marriages.[11] Judge Bork expressed his fear in *Dronenburg,* that the protection of homosexual conduct through the right of privacy will lead to the protection of all private sexual behavior:

We would find it impossible to conclude that a right to

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[11]In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810 (1972), and *Singer v. Hara,* 11 Wash. App. 247, 522 P.2d 1187 (1974), it was concluded that the refusal of the respective states to issue marriage licenses to homosexual couples did not violate constitutional rights. The issues are discussed in G. Buchanan, *Same-Sex Marriage: The Linchpin Issue,* 10 U. Dayton L. Rev. 541 (1985). *See also* Saphire, *supra,* at 790 ("There is no reason in either logic or human nature why these human capacities and aspirations cannot be developed and expressed in other forms of society than a traditional heterosexual marriage. Consequently, there is no convincing rationale for limiting the right to privacy to the traditional marriage.")

> homosexual conduct is "fundamental" or "implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

741 F.2d at 1369. A similar fear was expressed by Judge Gabrielli in his dissent in *Onofre:*

> Moreover, if the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution, and homosexual marriage. I very much regret that the majority has failed in its discussion of the "fundamental right" to personal autonomy to set forth analytical framework for resolving difficult questions such as these.

415 N.E.2d at 950 n.3.

These fears are well founded. A rejection of historical analysis in favor of any of the tests proposed above, including that of the Eleventh Circuit, would appear to legalize polygamy, homosexual marriage, incest, necrophilia, private use and possession of many controlled substances, bestiality, fornication, adultery, and perhaps prostitution. There are some who genuinely favor the legalization of such activities, but the point here is not the desirability *vel non* of legalization. The point is that the Court is not a "super-legislature," *Griswold,* 381 U.S. at 482, empowered to adjudicate according to the personal preferences or political agendas of its members or any other persons or institutions. Instead, the Court's job is to expound the Constitution. As has been demonstrated, no responsible analysis of the Fourteenth Amendment can include the practice of sodomy in the right of privacy. Any appropriate changes to this Georgia statute should be made by the Georgia legislature,

which is responsible to the citizens of that State. *See Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1200, 1202; *Baker v. Wade, 774 F.2d at 1286-87; Dronenburg,* 741 F.2d at 1397 ("if the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.")

VII. THE GEORGIA SODOMY STATUTE SHOULD NOT BE INVALIDATED UNDER THE EQUAL PROTECTION CLAUSE INASMUCH AS IT IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

Since the Eleventh Circuit based its decision on the right of privacy, *amici curiae* assume that no equal protection issue is before the Court. If, however, the Court should address equal protection issues, it is the position of these *amici curiae* that no form of strict or heightened scrutiny should be employed. This case is not appropriate for the application of either the fundamental rights or the suspect classification branch of strict scrutiny. For the reasons presented above the Georgia statute does not burden fundamental rights. Moreover, the statute does not involve a suspect or quasi-suspect classification so as to trigger heightened review. A number of lower court decisions have held that homosexuality is not a suspect or quasi-suspect. classification. *See Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education,* 729 F.2d. 1270, 1273 (10th Cir. 1984); *Hatheway v. Secretary of the Army,* 641 F.2d 1376, 1382 (9th Cir. 1981), *cert. denied,* 454 U.S. 864 (1981); *DeSantis v. Pacific Telephone & Telegraph Company,* 608 F.2d 327 (9th Cir. 1979); *Singer, supra,* 522 P.2d at 1192. Therefore, state action based on homosexual classifications should be evaluated only under a rational basis test. In *Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1202; *Baker v. Wade,* 769 F.2d at 292; and *Dronenburg,* 741 F.2d at 1397-98, the rational basis test was employed.

Although the case before the Court has never been tried and the State has had no opportunity to present evidence regarding the interests served by the statute, it can be judicially noticed that the statute is rationally related to the State's legitimate interest in preserving and protecting morality.[12] As this Court has held in other contexts, legislative bodies may act "to protect *'the social interest in order and morality.'*" *Paris Adult Theatre I,* 413 U.S. at 61, *quoting Roth,* 354 U.S. at 485 (cit. omitted) (emphasis added by Court in *Roth*). *See also Paris Adult Theatre I,* 413 U.S. at 59-60 ("there is a 'right of the Nation and of the States to maintain a decent society' ") (cit. omitted); *United States v. Orito,* 413 U.S. 139, 144 (1973), *quoting North American Co. v. SEC,* 327 U.S. 686, 705 (1946) ("Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.")

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[12]The extraordinary health risks which accompany homosexual practices are well known. These include the current epidemic of Acquired Immune Deficiency Syndrome (AIDS). It appears that factual development would be necessary before the relationship, if any, between the Georgia statute and the reduction of such risks could be evaluated.

CONCLUSION

For the above-stated reasons, the judgment of the Eleventh circuit should be reversed.

Respectfully Submitted,

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APPENDICES

APPENDIX A

Apart from the recognition of sodomy as a common law crime, the following jurisdictions had enacted sodomy statutes prior to the adoption of the Fourteenth Amendment in 1868*:

Alabama (1819)

Aiken's Digest of Alabama Laws, Penal Code, c. 6, § 7, p. 239 (Supp. 1841).

Ala. Code, Art, 5, § 3235 (1852).

Arizona (Terr.)

Howell Code, c. 10, § 48 (1865).

Arkansas (1836)

Ark.Rev.Stat., c. 44, div. III, Art. IV, § 3, p. 245 (1837).

California (1850)

Cal.Sess.Laws, c. 99, § 48 (1849-50).

Colorado (Terr.)

Colo.(Terr.)Rev.Stat., c. 22, §§ 45, 46, p. 203 (1868); Colo.Gen. Laws of Terr. of Colo., 1st Sess., § 46, p. 297 (1861).

Connecticut (1788)

Laws of Conn., Capital Laws, § 7 (1673).

An Act for the Punishment of Divers Capital and other Felonies, p. 66 (1784).

Acts and Laws of the State of Conn., p. 182, para. 2 (1796).

Conn.Rev.Stat., tit. 6, c. 7, § 77, p. 237 (1849).

Conn.Rev.Stat., tit. 6, c. 7, § 77, p. 323 (1854).

Conn.Gen.Stat., tit. 12, c. 7, § 124, p. 265 (1866).

Delaware (1787)

Laws of 1719, c. 22, § 5, The First Laws of the State of Delaware 67 (J. Cushing ed. (1981).

Del.Rev.Stat., tit, 20. c. 131, § 7, p. 485 (1852).

Florida (1845)

Act of Mar. 5, 1842, § 1, Digest of the Statute Law of the State of Florida, div. 4, tit. 1, c. 7, § 11, p. 500 (Thompson 1847).

* Dates of admission to the Union are indicated in parentheses.

Georgia (1788)

Ga.Pen.Code of 1816, 5th Div., §§ 35-36, Compiled Laws 1810-1819, p. 571 (Lamar 1821).

Ga.Pen.Code, div. 4, § 63 (1833), Digest of the Statute Laws of the State of Georgia, p. 787 (Cobb 1851).

Code of Ga., pt. IV, tit. 1, div. IV, §§ 4251, 4252, 4255, pp. 824-25 (1861).

Ga.Rev.Code, §§ 4286, 4287, 4290, p. 841 (1867).

Kingdom of Hawaii

Hawaii Pen. Code, c. 13, § 9 (1850).

Illinois (1818)

Ill.Rev.Code, Crim. Code. §§ 49, 50, pp. 132 (1827).

Ill.Rev.Stat., Crim. Code, §§ 49, 50, pp. 179-180 (1833)

Ill.Rev.Stat., c. 30, div. 5, §§ 49, 50, p. 158 (1845).

Kansas (1861)

Kan.(Terr.)Rev.Stat., c. 53, § 7, p. 284 (1855).

Kan.Gen.Stat., c 31, § 231, p. 368 (1868).

Kentucky (1792)

Act of Feb. 10, 1798, § 4; Digest of the Statute Laws of Kentucky, vol. 2, p. 1265 (Morehead & Brown 1834).

Ky.Rev.Stat., c. 28, art. 4, § 11, p. 249 (1852).

Ky.Rev.Stat., vol. 1, c. 28, art. 4, § 11, p. 381 (Stanton 1860).

Louisiana (1812).

La.Rev.Stat., Crimes and Offenses, § 5, p. 136 (1856).

Maine (1820)

Act of Feb. 19, 1821, Me. Laws, vol. 1, c. 5, p. 61 (1821).

Me.Rev.Stat., tit. 12, c. 160, § 4, p. 685 (1840).

Me.Rev.Stat., tit. 11, c. 124, § 3, p. 684 (1857).

Maryland (1788)

Act of 1793, c. 57, § 10.

Act of Nov. 1809, c. 86; Revised Laws of Md., vol. 3, p. 460 (Maxcy 1811); Gen. Publ. Stat. vol. I, p. 575 (Dorsey 1840).

Md. Code, vol. 1, art. 30, § 201, p. 251 (1860).

Massachusetts (1788)

Body of Liberties of 1641

Code of 1648

Book of the General Laws and Liberties (Mass), p. 5 (1648).

Mass.Acts & Resolves, c. 133, § 1, p. 209 (1804-05).

Mass.Rev.Stat., pt. 4, tit. 1, c. 130, § 14, p. 741 (1836).

Mass.Gen.Stat., c. 165, § 18, p. 819 (1860).

Michigan (1837)
Act of 1816 (Cass Code), §§ 4, 57; Laws of Terr. of Mich. 1805-1825, vol. 1, pp. 109, 132 (1871).
Act of 1820 (Cass Code), § 4; Laws of Terr. of Mich. 1805-1825, vol. 1, p. 562 (1871).
Act of 1827 for Punishment of Crimes, § 4; Laws of Terr. of Mich., pp. 444-45 (1833)
Mich.Rev.Stat., pt. 4, tit. 1, c. 8, § 14, p. 648 (1837-38).
Mich.Rev.Stat., tit. 30, c. 158, § 16, p. 682 (Green 1846).
Mich.Comp.Laws, vol. 2, c. 185, § 16 (§ 5871), p. 1543 (1857).

Minnesota (1858)
Minn.(Terr.)Rev.Stat., c. 107, § 13, p. 520 (1851).
Minn.Rev.Stat., c. 100, § 13, p. 622 (1866).

Mississippi (1877)
Act of Feb. 15, 1839, Miss. Code, c. 64, tit, VII, § 20, p. 980 (Hutchinson 1848).
Miss.Rev.Code, c. 64, art. 238, p. 611 (1857).

Missouri (1821)
Mo.Rev.Stat., art. VIII, § 7, p. 206 (1835).
Mo.Rev.Stat., vol. 1, c. 50, art. VIII, § 7, p. 624 (1856).

Montana (Terr.)
Mont. (Terr.) Laws, Criminal Practice Acts, c. 4, § 44, p. 185 (1864).

Nebraska (1867)
Neb.(Terr.)Rev.Stat., Crim. Code, c. 4, § 47, pp. 599-600 (1866).

Nevada (1864)
Act of Nov. 26, 1861, Nev.Comp.Laws, vol. 1, c. 55, § 2351, p. 565 (1861-73).

New Hampshire (1788)
Act of Feb. 8, 1791, N.H. Laws, pp. 269-70 (1785-96).
Act of June 19, 1812, § 5, N.H. Rev.Laws, p. 318 (1815).

New Jersey (1787)
N.J.Rev.Stat., tit. 8, c. 1, § 9, p. 259 (1847).

New York (1788)
N.Y.Rev.Stat., vol. 3, pt. 4, c. 1, tit. 5, art. 3, § 20, p. 970 (1858).

North Carolina (1789)
N.C.Rev.Stat., c. 34, § 6, p. 192 (1836-37).
N.C.Rev.Code, c. 34, § 6, p. 203 (1854).

Oregon (1859)
Ore.Rev.Stat., Crimes and Misdemeanors, c. 11, § 12, p. 235 (1855)

Act of Oct. 19, 1864, § 639, Ore. Code, vol. 1, Criminal Code, tit. 2, c. 7, § 1874, p. 951 (1887).

Pennsylvania (1787)

Act of January 12, 1705-06, in Stat. at Large of Pa. from 1682-1801, vol. 2 (1700-1712), p. 183 (1896) (repealed by Act of March 31, 1860, Pub.Law 451).

Act to Reform the Penal Laws of the State, § 2 (1790), in Laws of the Commonwealth of Pa. vol. 2, p. 531 (1810).

Act of March 31, 1860, § 32, Pub.Law 392, in Digest of Statute Law of Pa. 1700-1903, vol. 1, p. 1011 (Purdon 1905).

Rhode Island (1790)

Acts and Laws of the Colony of Rhode Island, p. 6 (1719).

R.I. Pub. Laws, p. 339 (1822).

R.I. Pub. Laws, Crimes and Punishments, § 90, p. 394 (1844).

R.I.Rev.Stat., c. 216, § 11, p. 544 (1857).

R.I.Gen.Stat., c. 232, § 12, pp. 553-54 (1872).

South Carolina (1788)

Act of 1712, pp. 465, 493, in Stat. at Large of S.C. 1682-1716, vol. 2, p. 493 (Cooper 1837).

Tennessee (1796)

Tenn.Rev.Stat., Penal Laws and Penalties, § 17, p. 246 (1831).

Tenn. Code, § 4843, p. 868 (1857).

Texas (1845)

Act of Feb. 11, 1860, p. 97; Tex.Rev.Stat., Penal Code, tit. 10, c. 5, art. 342, p. 46 (1879); Digest of the Laws of Texas, art. 2033, pp. 430-31 (Paschel, 2d ed. 1870).

Vermont (1791)

Act of Feb. 19, 1779, Laws of Vermont 1777-1780, p. 128 (A. Soule ed. 1964).

Virginia (1788)

Va.Code Revision of 1777. (*See* D. Malone, *Jefferson the Virginian* 271-73 (1948)).

Va. Code, tit. 54, c. 197, § 12, p. 740 (1849).

Code of Va., tit. 54, c. 196, § 12, p. 804 (1860).

W. Virginia (1863)

Before 1863, *see* Va. Code.

W. Va. Code, c. 149, § 12, p. 694 (1868).

Wisconsin (1848)

Wis.Rev.Stat., c. 139, § 15, p. 709 (1849).

APPENDIX B

The following state sodomy statutes are currently in force:

Ala. Code § 13A-6-65 (a) (3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 1412 (Supp. 1984-1985); Ark. Stat. Ann. § 41-1813 (1977); D.C. Code Ann. § 22-3502 (1981); Fla. Stat. Ann. § 800.02 (West 1976); Off. Code Ga. Ann. § 16-6-2 (1984); Idaho Code §§ 18-6605, 6606 (1979); Kan. Stat. Ann. § 21-3505 (Supp. 1984); Ky. Rev. Stat. Ann. § 510.100 (Baldwin 1985); La. Rev. Stat. Ann. § 14:89 (West Supp. 1985); Md. Code Ann. art. 27, §§ 553, 554 (Supp. 1984); Mass. Ann. Laws, ch. 272, §§ 34, 35 (Michie/Law. Co-op. 1980); Mich. Comp. Laws Ann. §§ 750.338, 338a (West 1968); Minn. Stat. Ann. § 609.293 (West Supp. 1985); Miss. Code Ann. § 97-29-59 (1973); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. § 45-5-505 (1985); Nev. Rev. Stat. § 201.190 (1979); N.C. Gen. Stat. § 14-177 (1981); Okla. Stat. Ann. tit. 21, § 886 (West 1983); R.I. Gen. Laws § 11-10-1 (1970); S.C. Code Ann. § 16-15-120 (Law Co-op 1985); Tenn. Code Ann. § 39-2-612 (1982); Tex. Penal Code Ann. § 21.06 (Vernon 1974); Utah Code Ann. § 76-5-403 (Supp. 1983); Va. Code § 18.2-361 (1982).

CERTIFICATE OF SERVICE

I, GEORGE M. WEAVER, Attorney of Record for *amici curiae* and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief *Amici Curiae* upon counsel of record for Petitioner and Respondent by depositing copies of this brief in the United States mail with proper address and adequate postage to:

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This _____ day of December, 1985.

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